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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 KURT JEFFREY ANGELONE, ) CASE NO. C09-1103-MJP  
09 )  
Petitioner, )  
10 )  
v. ) REPORT AND RECOMMENDATION  
11 )  
PATRICK GLEBE, )  
12 )  
Respondent. )  
\_\_\_\_\_ )

13  
14 INTRODUCTION AND SUMMARY CONCLUSION

15 Petitioner Kurt Jeffrey Angelone proceeds *pro se* in this 28 U.S.C. § 2254 habeas action.  
16 He is in custody pursuant to a 1997 conviction by guilty plea on one count of attempted first  
17 degree murder. (Dkt. 18, Ex. 1.) In pleading guilty, petitioner admitted he committed the act  
18 of first degree murder by stabbing the victim and stipulated he was a persistent offender for  
19 purposes of Washington's Persistent Offender Accountability Act. (*Id.*, Exs. 3 & 4.)  
20 Snohomish County Superior Court sentenced petitioner, as a persistent offender, to life  
21 imprisonment without the possibility of parole. (*Id.*, Dkt. 5.)

22 Petitioner raises a number of different grounds for relief in his habeas petition. (Dkt. 7;

01 Dkt. 21 at 9.) Respondent filed an answer to the petition with relevant portions of the state  
02 court record. (Dkts. 17 & 18.) Respondent argues that the Court need not determine whether  
03 petitioner properly exhausted his available state court remedies because his petition is untimely  
04 under the federal statute of limitations, 28 U.S.C. § 2254(d). Petitioner objects to respondent's  
05 arguments in a reply (Dkt. 21) and seeks leave to conduct limited discovery and a temporary  
06 stay (Dkt. 14).<sup>1</sup>

07 The Court has reviewed the record in its entirety. For the reasons discussed below, the  
08 Court agrees with respondent that this action is time-barred, and recommends that petitioner's  
09 motion to conduct discovery and for a stay be denied, and that the petition be denied and this  
10 action dismissed.

11 Petitioner did not appeal his January 17, 1997 judgment and sentence. (*See* Dkt. 7 at  
12 2.) Over nine years later, in February 2006, petitioner filed a personal restraint petition in the  
13 Washington Court of Appeals. (Dkt. 18, Ex. 5.) The court dismissed the petition as  
14 time-barred under RCW 10.73.090. (*Id.*, Ex. 13.) Petitioner sought review by the  
15 Washington Supreme Court. (*Id.*, Ex. 14.) The Commissioner of the Supreme Court denied  
16 review, agreeing that the petition was untimely. (*Id.*, Ex. 16.) The Supreme Court  
17 subsequently denied a motion to modify the Commissioner's ruling, and the Court of Appeals  
18 issued a certificate of finality. (*Id.*, Exs. 17-19.)

19 Petitioner filed a second personal restraint petition in April 2008. (*Id.*, Ex. 20.)  
20 Again, the Court of Appeals dismissed the petition as time-barred and the Commissioner of the  
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22 <sup>1</sup> Petitioner also filed a motion for an extension of time to submit his reply. (Dkt. 20.) This  
motion is hereby STRICKEN as moot given that plaintiff timely submitted his reply.

01 Supreme Court agreed with the lower court and denied review. (*Id.*, Exs. 23-25.) The  
02 Supreme Court also denied petitioner's motion to modify the Commissioner's ruling and the  
03 Court of Appeals, in April 2009, issued a certificate of finality. (*Id.*, Exs. 26-28.)

04 Pursuant to 28 U.S.C. § 2244(d)(1), a one-year statute of limitations applies to § 2254  
05 habeas actions. That period of limitation commences as follows:

06 (1) A 1-year period of limitation shall apply to an application for a writ  
07 of habeas corpus by a person in custody pursuant to the judgment of a State  
court. The limitation period shall run from the latest of-

08 (A) the date on which the judgment became final by the conclusion of  
09 direct review or the expiration of the time for seeking such review;

10 (B) the date on which the impediment to filing an application created  
11 by State action in violation of the Constitution or laws of the United  
States is removed, if the applicant was prevented from  
filing by such State action;

12 (C) the date on which the constitutional right asserted was initially  
13 recognized by the Supreme Court, if the right has been newly recognized  
by the Supreme Court and made retroactively applicable to cases on  
14 collateral review; or

15 (D) the date on which the factual predicate of the claim or claims  
16 presented could have been discovered through the exercise of due  
diligence.

17 28 U.S.C. § 2244(d)(1).

18 In this case, the statute of limitations began to run on the date on which the judgment  
19 became final through the conclusion of direct review or the expiration of time for seeking direct  
20 review. § 2244(d)(1)(A). The period of direct review ordinarily includes the ninety-day  
21 period in which a petitioner may file a petition for writ of certiorari with the United States  
22 Supreme Court, whether or not the petitioner actually files such a petition. See *Bowen v. Roe*,

01 188 F.3d 1157, 1159 (9th Cir. 1999); *see also* Sup. Ct. Rule 13(1). However, if a petitioner  
02 fails to seek direct review from the highest state court, the conviction becomes final when the  
03 time for seeking such review elapses. *Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir.  
04 2001). In Washington, a notice of appeal must be filed within thirty days after the entry of the  
05 decision of the trial court. Wash. RAP 5.2(a). Accordingly, the end of this thirty day period  
06 marks the expiration of the time for seeking review pursuant to § 2244(d)(1)(A). *Wixom*, 264  
07 F.3d at 898.

08       The Washington Court of Appeals issued its decision on January 17, 1997. (Dkt. 18,  
09 Ex. 1.) The time for filing a notice of appeal expired thirty days later, on February 17, 1997.  
10 Wash. RAP 5.2(a). Because petitioner did not file an appeal, his judgment and sentence  
11 became final no later than February 17, 1997. *Wixom*, 264 F.3d at 897-98. The statute of  
12 limitations began to run as of that same date. It ran for 365 days and expired in February 1998  
13 – more than eleven years before petitioner filed his federal habeas corpus petition in August  
14 2009.

15       The one year limitations period is tolled for any properly filed collateral state challenge  
16 to the pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). However, in this case, petitioner  
17 did not file a personal restraint petition until February 2006. (Dkt. 18, Ex. 5.) Because the  
18 statute of limitations had expired in February 1997, some nine years earlier, the personal  
19 restraint petition did not toll the statute of limitations.

20       The statute of limitations is also subject to equitable tolling. *Laws v. Lamarque*, 351  
21 F.3d 919, 922 (9th Cir. 2003). The Ninth Circuit has made clear that equitable tolling is  
22 available “only when extraordinary circumstances beyond a prisoner’s control make it

01 impossible to file a petition on time and the extraordinary circumstances were the cause of his  
02 untimeliness.” *Id.* (internal quotation marks and quoted source omitted). In other words,  
03 equitable tolling may be appropriate when external forces, rather than petitioner’s lack of  
04 diligence, prevent timely filing. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

05 Here, petitioner argues, *inter alia*, that he was coerced into pleading guilty, that his  
06 imprisonment is a fundamental miscarriage of justice, and that he is innocent. However, even  
07 assuming they could provide a basis for equitable tolling in this case, petitioner failed to  
08 provide sufficient support for these contentions. Nor does petitioner otherwise demonstrate  
09 extraordinary circumstances beyond his control inhibiting his ability to timely pursue his claims  
10 and entitling him to the equitable tolling of the federal statute of limitations.

11 Because petitioner filed his petition outside of the § 2254 statute of limitations period,  
12 and because petitioner has not demonstrated that he is entitled to either statutory or equitable  
13 tolling of the limitations period, his petition is time-barred. There is no basis for plaintiff’s  
14 request for discovery, a temporary stay, or an evidentiary hearing. The Court, therefore,  
15 recommends that plaintiff’s motion for discovery and a stay (Dkt. 14) be DENIED and that  
16 petitioner’s federal habeas petition be DENIED and this case DISMISSED, without an  
17 evidentiary hearing and with prejudice, pursuant to 28 U.S.C. § 2244(d). A proposed order  
18 accompanies this Report and Recommendation.

19 DATED this 18th day of November, 2009.

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21 Mary Alice Theiler  
22 United States Magistrate Judge